IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1 OF 2002

IN

SESSIONS CASE NO.5 OF 2000

Shri Dadarao Shankar Baghav ..Appellant
(Orig.Accused)

Vs.

The State of Maharashtra ..Respondent

Mr.S.G.Deshmukh with Mr.Shrikant Yadav and Mr.Dilip Bodake for the appellant

Mrs.P.H.Kantharia, A.P.P. for the state

CORAM : J.N.PATEL &
SMT.ROSHAN S.DALVI, JJ.

DATED : 9TH AUGUST, 2006

P.C.:

1. The appellant accused alongwith his father Shankar Ramchandra Bagav and mother Sou.Girijabai Shankar Bagav were tried on a charge of having committed offence under section 302, 498-A r/w s.34 of the Indian Penal Code by the IV Additional Sessions Judge, Pandharpur. By judgment and order

dt.3.11.01, the trial court found the appellant accused Dadarao Shankar Bagav guilty of having committed offence punishable under section 302 of the Indian Penal Code and was sentenced to suffer imprisonment for life and to pay fine of Rs.1000/- in default to suffer simple imprisonment for six months. He was also granted set off under section 428 of the Cr.P.C. The appellant accused was acquitted of the charge of having committed offence punishable under section 498 r/w s.34 of the Indian Penal Code whereas the original accused no.2 and 3 i.e. parents of the appellant accused were acquitted of the offence punishable under section 302, 498-A r/w s.34 of the Indian Penal Code.

2. It is the prosecution case that the deceased Varsharani was married to the appellant accused Dadarao Shankar Bagav on 10.7.99 and came to reside with the appellant accused. Soon after the marriage the appellant accused and her parents started ill-treating her on the pretext that she was not doing any work and cooking properly. This fact was revealed by her to her parents and relatives when she returned from her in-laws place.

Inspite of that she was sent to matrimonial house by her parents.

3. On the fateful day i.e.11.10.1999 at about 9.50 p.m. Sou. Varsha was brought to Primary Health Center, Velapur in burnt condition where she was attended by Dr.Anirudha Pimple, P.W.No.1 who was the Medical Officer in charge of Primary Health Centre. Dr.Pimple informed the police and referred the patient to Civil Hospital, Solapur vide the communication Ex.10. On reaching Civil Hospital, Solapur, she was admitted by Dr.Phule, P.W.No.13 who was on duty, called Police Head Constable Abdul Razak, P.W.No.2 who was attached to the Police Chowki situated in the campus of Civil Hospital, Solapur.

4. In the presence of Dr.Phule, Police Head Constable, Abdul Razak, P.W.No.2 recorded the statement of the victim after being satisfied that she was conscious and in a position to give a statement which was certified by Dr.Phule. After recording her statement Police Head Constable, Abdul Razak requested S.E.M. Dattatray Ganpat

Javanjal, P.W.No.11 to record the dying declaration of the victim. Dattatray Ganpat Javanjal, P.W.No.11 visited Civil Hospital and contacted Dr.Pradip Kasbe, P.W.No.12 and informed him the purpose of his visit and requested Dr.Kasbe, P.W.No.12 to examine the patient and certify that she was in a fit condition so that he would record her dying declaration. After Dr.Kasbe, P.W.No.12 examined the patient and found her fit, S.E.M. Dattatray Javanjal, P.W.No.11 recorded the dying declaration of the victim as per her say. P.H.C. Razzak, P.W.No.2 collected the dying declaration recorded by S.E.M. P.W.No.11 and forwarded the statement recorded by him and the dying declaration to Sadar Bazar Police Station on the basis of which Police Head Constable, Shri Bhartsing Tadavi, P.W.No.6 who was attached to Velapur Police Station registered Cr.No.0/99 in Velapur Police Station on the basis of crime no.0/99 registered by Sadar Police Station against the appellant accused and his parents i.e. original accused no.2 and 3 for having committed offences under section 307, 498A, 504 r/w s.34 of the Indian Penal Code, treated the statement recorded by Police Head Constable,

Razzak, P.W.No.2 of the victim as F.I.R. (Ex.12) and handed over the investigation to P.S.I. Ashpat, P.W.No.10. P.S.I. Ashpat, P.W.No.10 on the next day visited the scene of occurrence i.e. house of the appellant accused at Village Pisewadi, Sheri and in the presence of panchas, he prepared scene of occurrence panchnama and seized kerosene, stove, a tin box, match box half burnt nylon sari and two pieces of blouse which were smelling of kerosene and sent all the articles to forensic science laboratory for chemical analysis. He then recorded the statement of Tukaram Sathe and other witness and thereafter he went to Civil Hospital, Solapur to meet the informant Varsha. He saw that Varsha's parents were present so he recorded their statements. On 15.10.99, the appellant accused came to be arrested alongwith his parents and two relatives of the appellant accused, Sakhubai Bagav and Bandopant Bagav being juvenile offenders were referred to juvenile court and their case was separated. In the course of investigation, police also got prepared the plan of scene of occurrence. On 17.10.99 from the papers received from Sadar Bazar Police Station, Solapur, police came to know

that Varsha died on 15.10.99 itself and therefore P.S.I. Ashpat altered the offence under section 307 of the Indian Penal Code initially registered against the accused persons to one under section 302 of the Indian Penal Code. It appears that before the intimation was sent to Velapur Police Station by Sadar Bazar Police Station on the death of Varsha, on 15.10.99 Sadar Bazar Police Station prepared inquest panchnama Ex.15 between 1500 hours to 1600 hours. Thereafter the dead body of Varsha was sent for post mortem at Dr.V.M. Medical College and General Hospital, Solapur. On 15.10.99 itself Dr.Uma Advani conducted autopsy on the dead body of Varsha and submitted post mortem examination report Ex.26 and forwarded it to the concerned police station. After completion of the investigation, the police filed charge sheet against the appellant accused and the appellant accused were put on trial on the aforesaid charge.

5. In reply to the charge, the appellant accused pleaded not guilty and claimed to be tried. It is their case that they have been falsely implicated at the instance of parents of deceased

Varsha.

6. On completion of trial, the trial court found that the prosecution has been able to establish that it is the appellant accused who is only guilty of having committed murder of his wife Sou. Varsha by pouring kerosene on her person and setting her ablaze. The trial court was of the view that the prosecution has not established that the original accused no.2 and 3 shared any common intention with the appellant accused when he committed the offence and in so far as allegation of ill-treatment was concerned as there was no specific case made out that the deceased was treated with cruelty so as to coerce her or her relatives to get dowry, offence under section 498A is not maintainable and for these reasons, the appellant accused as well as his parents were acquitted of the charge under section 498-A.

7. The learned counsel for the appellant accused submitted that the prosecution case solely depends upon the two dying declarations alleged to be recorded by the police head constable, Razzak,

P.W.No.2 and S.E.M. Dattatraya Javanjlal, P.W.No.11. It is submitted that if the victim had suffered 58% burns which include her hands and fingers, in that case, it is not possible for the victim to have signed her statement below Ex.12 and 37. But then Police Head Constable, Razzak, P.W.No.2 and S.E.M.Javanjlal, P.W.No.11 claim to have obtained her signature which itself shows that their evidence is unreliable and not trustworthy in the eyes of law and that the dying declarations have been recorded at the instance of the parents of deceased who were very much present by her side and therefore, it will be unsafe to convict the appellant accused merely on the basis of the dying declarations.

8. It is further submitted that though the prosecution has examined the concerned Medical Officer Dr.Phule, P.W.No.13, P.W.No.12, Dr.Kasbe who has certified as to the condition of the patient when her statement came to be recorded by Police Head Constable, Razzak and S.E.M.Javanjlal does not indicate that he examined the patient before satisfying themselves that she was in a fit

condition to give statement as there is no endorsement to this effect. The two dying declaration Ex.12 and Ex.37 are also tampered on the ground that the statements are made against Dadarao @ Ramchandra whereas the appellant's name is Dadarao and not Ramchandra. In the statement Ex.12 there is name of the deponent as Miss Varsha Dadarao @ Ramchandra Baghav, aged 18 years whereas in the statement i.e. dying declaration Ex.37 the name given is Varsha Dadarao @ Ramchandra Baghav, aged 16 years. The statements have two different signatures and name written on them creates suspicion in one's mind as to whether it is the same statement which has been made by deceased Varsha.

9. It is therefore, submitted that the trial court committed error in drawing the inference that Ramchandra appears to be the nick name of the appellant accused in absence of any evidence on record and that when this fact was specifically put to the appellant accused in his examination under section 313 of the Cr.P.C. he has denied it by answering that it is false. It is submitted that

the trial court ought to have referred the signatures on the two dying declaration to the hand writing expert for his opinion but formed his own opinion that the letters and handwriting are similar to that of the deceased on the two dying declarations.

10. The learned counsel for the appellant accused further submitted that the dying declarations are not recorded in question and answer form nor they are in the actual words of the deceased and therefore, these dying declarations cannot be accepted as evidence against the appellant accused as it loses its privity and genuineness in the eyes of law and therefore, the possibility of the victim having suffered burn injuries accidently cannot be ruled out.

11. It is further submitted that S.E.M.Javanjal was not holding the post of Special Executive Magistrate as he had not attached his seal of office and therefore, he had no power to record the dying declaration being an ordinary clerk and therefore, no solemnity can be attached to such

dying declaration recorded by a person having no authority and that of doubtful credentials.

12. It is submitted that the trial court has arrived at the conclusion that the appellant accused poured kerosene on the victim and set her ablaze by drawing certain inferences based on conjecture and surmises and therefore, the evidence considered as a whole does not inspire confidence and therefore, the appellant accused deserves to be acquitted.

13. Mrs.Kantharia, the learned A.P.P. for the state submitted that the charge against the appellant accused stands duly proved by the prosecution on the basis of circumstantial evidence as well as two dying declarations, one recorded by Police Head Constable, Razzak, P.W.No.2 and the other by S.E.M.Javanjlal which are consistent and clearly implicate the appellant accused as the author of the burn injuries suffered by the victim which caused her death. It is submitted that the medical evidence on record clearly indicates that Varsha’s death was homicidal i.e. as a result of

burn injuries.

14. Mrs.Kantharia, the learned A.P.P. further submitted that it is not in dispute that the deceased Varsha got burnt in house of the appellant accused and she was immediately rushed to Primary Health Centre at Velapur from where she was referred to Civil Hospital at Solapur and at the request of Dr.Phule, P.W.No.13 Police Head Constable, Razak, P.W.No.2 recorded her statement in which she clearly implicated her husband and, thereafter, S.E.M., Javanjal, P.W.No.11 recorded her dying declaration on the request of Razak, P.W.No.2 and on the basis of which Cr.No.0/99 came to be recorded by Sadar Bazar police Station at Solapur against the appellant accused, his parents and relatives for having committed the offence under section 307, 498A, 504 r/w sec.34 of the Indian Penal Code. It is submitted that as the offence was committed within Jurisdiction of Velankar Police Station, Sadar Police Station forwarded the case papers to Velapur Police Station and then offence came to be registered against the appellant accused and immediately investigation was

carried out. Scene of occurrence panchnama and the articles seized at the scene of occurrence were referred to chemical analyser which has given a positive finding that the stove and the partly burnt pieces of the clothes of the deceased were found having residue of kerosene and tested positive. This is a clear indication of the fact that Varsha was set ablaze by her husband i.e. the appellant accused by pouring kerosene on her person and it goes to corroborate her dying declaration which is consistent in all respects.

15. Mrs.Kantharia submitted that at the time of recording both the dying declarations necessary precautions have been taken by the concerned persons by getting the victim examined by Medical Officers who certified that the patient was in a fit condition to make a statement which is sufficient enough to establish that Varsha was conscious to give statement. It is submitted that there is no such requirement of law that dying declaration has to be in question and answer form. On the other hand in the two dying declarations given by Varsha, she has clearly implicated her

husband i.e. the appellant accused as the person who poured kerosene on her person and set her ablaze.

16. Mrs.Kantharia submitted that in so far as the contention of the appellant accused that the victim had suffered burn injuries to her hands, it would not be possible for her to put her signature below her dying declaration is without any basis as it all depends as to whether the fingers were so burnt that she was not able to affix her signature to the dying declarations. It is submitted that in so far as name of the appellant accused is concerned, the victim has given his name as Dadarao @ Ramchandra which has been accordingly recorded and it is not the case of the appellant accused that the victim was married to someone else and she is not his wife and, therefore, the appellant accused cannot now take the plea that the person who poured kerosene on body of Varsha and set her ablaze was someone else as a result of which she suffered burn injuries in the house of appellant accused who is none other than her husband. It is therefore submitted that the prosecution has proved

its case beyond reasonable doubt and the appeal deserves to be dismissed.

17. The deceased Varsha's death was homicidal is not much in dispute. Similarly, the fact that she died due to shock and toxaemia due to 58% burns also stands established by the prosecution. The prosecution has examined Dr.Uma Advani, P.W.No.7 who conducted the autopsy of the dead body of Varsha alongwith Dr.S.V.Telkar and has deposed in her evidence, the nature of surface, wounds and injuries which were found on the victim as under:

1. Head, neck and face - 3%
(Upper part of face spared)

2. Rt.upper limb - 9%

3. Lt.upper limb - 8% (dorsal and ventral aspect of arm spared)

4. Chest and abdomen - 13%
(below umbilicus abdomen spared)

5. Perimeum - 0

6. Back and trunk - 16% (lower portion) of trunk spared)

7. Rt.lower limb 5% (medical aspect of thingh and posterior aspect of thigh burnt)

8. Lt.lower limb 4% (lateral aspect and posterior aspect of thigh burnt)

Total burns were 58%. They were red to yellowish colour burns, superficial to deep, yellowish, infected. All those burns were ante mortem.

18. In the opinion of Dr.Advani, the injuries found on the body of the deceased collectively were sufficient in the ordinary course of nature to cause the death. The prosecution case that the victim suffered the burn injuries in the house of the appellant accused is also not a matter of contest. From the cross-examination of the

witness, it appears that the appellant accused took up the plea that the victim suffered these burns at the time she was cooking accidently, as palloo of her saree fell on the burning stove, though these suggestions have been negatived by all the witnesses.

19. The prosecution case primarily rests on the dying declarations made by the victim to her parents while she was being taken to Civil Hospital at Solapur and thereafter, when her statement came to be recorded by P.W.No.2 Abdul Razak who was at the relevant time working as a Police Head Constable in a police chowky situated in the Civil Hospital, Solapur and the one recorded by the S.E.M. Javanjal, P.W.No.11. The learned counsel for the appellant accused has vehemently urged that mere reading of the two dying declarations, one in the form of report which was treated as an F.I.R. and the other recorded by S.E.M. are not consistent and is a result of the victim being tutored by her parents who were admittedly accompanying her. It was also canvassed that Police Head Constable P.W.No.2, Razak has taken

down the report in such a manner so as to implicate all the family members of the appellant accused and even introduced the facts which would make it an offence under section 498 of the Indian Penal Code which itself indicates that it was recorded at the behest of the parents of the deceased as part of her statement.

20. The other contention is as to the state of health of the victim at the time her statement came to be recorded. Now let us examine the evidence of P.W.No.2, Head Constable, Abdul Shaikh and P.W.No.13, Dr.Phule who are the witnesses as regards the first dying declaration recorded of the victim and then that of S.E.M., Javanjal, P.W.No.11 and Dr.Kasbe, P.W.No.12 who are concerned with the recording of the second dying declaration. In so far as evidence of the relatives of the victim are concerned i.e. her father, Namdeo Sathe, P.W.No.3, merely goes to the effect that he inquired from his daughter as to how she got burnt and she told him that it was the appellant accused who poured kerosene on her person and set her ablaze. We may not attach much importance to the oral dying

declaration made by the victim to her father considering the fact that it comes through father of the victim but the statement recorded by Police Head Constable, P.W.No.2, Razak assumes importance.

21. According to P.W.No.2, Razak on the relevant date and time he was on duty at the police chowki situated in the Civil Hospital, Solapur i.e. from 9 p.m. of 11.10.99 to 9 a.m. of 12.10.99. The Police Chowki is located besides the O.P.D. in the hospital premises which comes within the Jurisdiction of Sadar Bazar Police Station. On 12.10.99 between 00.00 hours to 00.15 hours one burnt patient came into the hospital and, therefore, he was called by the doctor. He met Dr.Phule, P.W.No.13 who was on duty at that time and he was examining the patient. So he asked the patient her name and address and made enquiry from P.W.No.13, Dr.Phule whether the patient was conscious and whether he could take her statement. The doctor examined the patient and told him that the patient was conscious and allowed him to record the statement of the patient. To that effect Dr.Phule made an endorsement on the paper in which

he recorded the statement and thereafter he recorded the statement of the patient who told her name as Mrs. Sou. Varsha Dadarao @ Ramchandra Bagav R/o Sheri (Velapur) Taluka Malshiras. According to Police Head Constable, Razak, P.W.No.2, the victim told him that in her matrimonial house her husband, her father-in-law, her mother-in-law, her brothers-in-law, her sister-in-law, did reside jointly. They were ill-treating her by saying that he was not able to work. Her husband used to beat her and that she has told this to her parents during her visit to their house and that on 11.10.99 at about 8 p.m. her husband poured kerosene on her body from iron stove and set her on fire because of which she got burnt. After recording her statement as per her say Police Head Constable got verified from Dr.Phule whether the patient was conscious. Dr.Phule again examined her and certified that she was conscious and therefore he read over the contents of the statement of Varsha and as she admitted that he correctly recorded she asked her whether she would sign or put T.I., she told him that she would sign. Hence he gave the statement

recorded by him to her and she signed the same in his presence and he has proved the same which is taken on record as Ex.12.

22. In his cross-examination, nothing has been brought on record to show that the statement given by Varsha and recorded by him was not voluntary and truthful. It was only suggested that parents of Varsha were present with her when he recorded the statement which was specifically denied by him. It was also put to him that even the signature of Varsha below the statement was not that of Varsha. It is P.W.No.2, Abdul Razak who was mainly concerned with the recording of statement and in the presence of Dr. Phule, P.W.No.13 and on going through the statement when he found that cognisable offence has been made out, he made a station diary entry and himself brought the S.E.M. with a letter of request to record the dying declaration of Varsha which has been proved as Ex.13. It is on receiving requisition from police head constable, Razak that P.W.No.11, Javanjal visited Civil Hospital. At that time Varsha was shifted to the burn ward. So P.W.No.11, Javanjal went to the burn

ward where he saw the patient who was attended by Dr.Kasbe, P.W.No.12. He then asked him to satisfy that the patient was in a fit condition to give a statement. On examining the patient, Dr.Kasbe told him that she was able to give the statement and also endorsed the certificate to that effect. In his evidence, S.E.M.Javanjal has stated that he recorded the dying declaration of the victim as per her say and that the victim signed twice below her statement in her maiden name and after her statement was recorded he again obtained endorsement of Dr.Kasbe. In the cross-examination of S.E.M. P.W.No.11 it was suggested that he has recorded the statement at the instance of the parents of the victim. The learned counsel for the appellant accused and the co-accused went to the extent of challenging the credentials and authority of P.W.No.11 to record the dying declaration which he has specifically denied.

23. On both the occasions i.e. when police head constable, P.W.No.2, Razak and S.E.M.Javanjal, P.W.No.11 recorded the statement and dying

declaration of the victim, it was in presence of the Medical Officers i.e.P.W.No.13, Dr.Phule and P.W.No.12, Dr.Kasbe who have also deposed to the effect that the victim was in a fit condition to make a statement and was well oriented. Though all these witnesses have been thoroughly cross-examined, we do not find anything from their evidence to doubt their credibility. All these witnesses have no interest in the case and they are independent witnesses. It cannot be accepted that the parents of the deceased were so rich and influential so as to buy-off not only the police head constable and the S.E.M. but also two responsible Medical officers working in Civil Hospital.

24. Now let us see whether there is any inconsistency in the two dying declarations. Much has been said by the learned counsel for the appellant accused on this issue. What we find is that the first statement which was treated as F.I.R. recorded by P.W.No.2, the victim has given her statement in detail giving all the particulars right from the time of her marriage till she

suffered burns stating to the effect of how she has been ill-treated by her husband and relatives on the pretext that she is not able to perform her daily chores and prepare food properly. But in the statement which was recorded by way of dying declaration by P.W.No.11, she has only restricted it to the complicity of the appellant accused that it is the appellant accused who has poured kerosene on her person and set her ablaze while she was cooking food. Therefore, on this crucial aspect as to how she suffered burn injuries, we do not find any discrepancy or for that reason inconsistency in her dying declaration. On the other hand, the dying declaration inspires confidence as she specifically exonerates her in laws in so far as the extent and manner in which her husband poured kerosene on her person and set her ablaze which rather belies the stand taken by the defence that the victim was tutored to implicate the accused persons by her parents. If that was so, there is no reason why deceased Varsha would not have implicated even her in laws in the act of pouring kerosene on her person and setting her ablaze.

25. We find that the dying declaration also stands corroborated by the scene of occurrence panchnama and the articles seized from the spot which were sent to the chemical analyser. But out of such articles was an empty can in which kerosene was detected. The empty can was found having residue of kerosene and particularly burnt sari, petticoat and blouse of the victim were also found having residue of kerosene and the results of analysis were positive. If the victim had suffered injuries by accident then the possibility of her clothes having kerosene was completely ruled out as it is nobody's case that the victim caught fire due to bursting of stove.

26. The dying declaration also stands amply corroborated by the medical evidence on record when in the evidence of Dr.Uma it has specifically come that the victim suffered burn injuries all over her body and particularly on her back which was to the extent of 16% and therefore, if all these evidence are read together, we have no hesitation to arrive at the conclusion that the two dying declarations made by the victim and which came to be recorded

clearly implicates the appellant accused as the person who put kerosene on her body and set her ablaze by lighting match sticks.

27. The trial court has considered the evidence on record in proper perspective and was justified in arriving at a conclusion that it is the appellant accused who is guilty of having committed the murder.

28. We find that the trial court has been quite fair in exonerating the appellant accused as well as her parents and relatives for the charge of having committed offence under section 498A of the Indian Penal Code as it did not find that the victim or his parents had deposed to the effect that she was treated with cruelty having nexus with any demand for dowry and further also found the in-laws of the victim not guilty with the charge of having committed offence under section 302 r/w s.34 of the Indian Penal Code.

29. We find rest of the evidence is formal in nature and has been taken into consideration by the learned Trial Court at the time of deciding the case. We therefore, do not find any merits in the appeal. Appeal is dismissed.

(SHRI J.N. PATEL, J)

(SMT.ROSHAN DALVI, J)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

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Vs.

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Mrs.P.H.Kantharia, A.P.P. for the state

CORAM : J.N.PATEL &
SMT.ROSHAN S.DALVI, JJ.

DATED : 9TH AUGUST, 2006

P.C.:
. For the reasons separately recorded, following order is passed:

. We find rest of the evidence is formal in nature and has been taken into consideration by the learned Trial Court at the time of deciding the case. We therefore, do not find any merits in the appeal. Appeal is dismissed.

(SHRI J.N. PATEL, J)

(SMT.ROSHAN DALVI, J)